ING Bank NV & Anor v Owner of the ship or vessel MV 'Malik Al Ashtar' (IMO/LR 9525900) of the Port of Malta (Vitol Asia Pte Ltd, intervener)

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO 27NCC-37–06 OF 2015
AZIZAH NAWAWI J
9 MARCH 2016

Civil Procedure — Summary judgment — Admission as to amount claimed by plaintiff — Second plaintiff entered into bunker supply agreement with defendant — Defendant failed to pay purchase price of bunker — Whether defendant made admission to plaintiffs' claim — Whether second plaintiff could pass title and ownership of bunker to defendant when title remained with intervener at all material time — Whether intervener could set up any defence — Whether there were triable issues — Rules of Court 2012 O 14 r 1 & O 27 r 3

The second plaintiff had entered into a security agreement with the first plaintiff whereby the second plaintiff had assigned by way of security to the first plaintiff all its rights in respect of monies owing or to be owed to it. The second plaintiff then entered into a bunker supply agreement with the defendant whereby the defendant agreed to purchase 2,500 metric tonnes of bunker ('the subject bunker') from the second plaintiff. The subject bunker was supplied to the defendant and the purchase price was to be made within 30 days from the date of delivery. Prior to the expiry of the 30 days period, the defendant received a notice of lien over the subject bunker from the intervener who claimed to be the true owner of the subject bunker. Subsequently, the second plaintiff entered into liquidation and assigned the right to payment of the subject bunker to the first plaintiff. In February 2015, the defendant's vessel was arrested by the intervener in a suit brought by the intervener ('the *Vitol* suit'). In order to secure the release of the vessel, the defendant had made payment to the court in the sum of RM6,492,126.70. The plaintiffs later arrested the defendant's vessel as security for the plaintiffs' claim for the purchase price of the subject bunker. In the present action, there were four applications made by all the parties which were: (a) the plaintiffs' application for summary judgment pursuant to O 14 r 1 of the Rules of Court 2012 ('the ROC 2012') and O 27 r 3 of the ROC 2012 based on the affidavits filed by the defendant in the *Vitol* suit where the defendant had allegedly admitted their indebtedness to the second plaintiff ('encl 26'); (b) the defendant's application to consolidate the present suit with the *Vitol* suit ('encl 33'); (c) the intervener's application to set up all defences available to the defendant ('encl 28'); and (d) the intervener's application to stay the present action ('encl 38'). The issues

for consideration were whether the defendant had made any admission to the plaintiffs' claim; whether the second plaintiff could pass the title and ownership to the defendant when the title remained with the intervener at all material time; and whether the intervener could set up any defence or was it limited to such defences which the defendant could have set up.

Held, allowing encl 26; dismissing encl 28 in part with costs; and dismissing both encls 33 and 38:

(1) Based on the admitted facts by the defendant in the affidavit filed in the *Vitol* suit, there was no dispute that the second plaintiff had entered into bunker supply agreement with the defendant and the subject bunker had been consumed by the defendant's vessel but the defendant had not made payment for the purchase of the subject bunker. Thus, there was merit in the plaintiffs' application in encl 26 (see para 28).

(2) In their affidavits, the defendants took the position that title and ownership of the subject bunker was not relevant to the plaintiffs' claim for the purchase price of the subject bunker, thus the defendant was estopped from submitting that there was a triable issue with regards to the title to the subject bunker. Further, the transfer of title was not an essential subject matter of the contract between the second plaintiff and the defendant, and that failure to transfer property in the bunkers, which had been consumed, did not relieve the defendant's obligation to pay for the purchase of the bunkers. Thus, there was no triable issue with regards to the issue of title to the bunkers (see paras 34–35 & 44).

(3) The intervener sought to set up the defence that since the 'plaintiff do not own the subject matter of the bunkers, they have no title to sue for costs of the bunkers', however, in the affidavits, the defendant took the position that title was not relevant in this action. Thus, the intervener could not resile from the position taken by the defendant. Based on the decision, the court also found that encls 33 and 38 were not relevant (see paras 54 & 58).

[Bahasa Malaysia summary

The plaintif kedua telah memasuki perjanjian sekuriti dengan plaintif di mana plaintif kedua telah diserahkan melalui sekuriti kepada plaintif pertama semua haknya berkaitan wang yang perlu dibayar atau terhutang olehnya. Plaintif kedua kemudian telah memasuki perjanjian bekalan bunker dengan defendan di mana defendan bersetuju untuk membeli 2,500 matrik ton bunker ('bunker tersebut') daripada plaintif kedua. Bunker tersebut telah dibekalkan kepada defendan dan harga belian perlu dibuat dalam tempoh 30 hari dari tarikh penghantaran. Sebelum tamat tempoh 30 hari itu, defendan telah menerima notis lien ke atas bunker tersebut daripada pencelah yang mendakwa pemilik sebenar bunker tersebut. Berikutan itu, plaintif kedua telah memasuki

likuidasi dan menyerahkan hak untuk bayaran bunker tersebut kepada plaintif pertama. Pada Februari 2015, kapal defendan telah ditahan oleh pencelah dalam guaman yang dimulakan oleh pencelah ('guaman *Vitol*'). Bagi tujuan menjamin pembebasan kapal itu, defendan telah membuat bayaran kepada mahkamah untuk jumlah RM6,492,126.70. Plaintif kemudian telah menahan kapal defendan sebagai sekuriti untuk tuntutan plaintif bagi harga belian bunker tersebut. Dalam tindakan ini, terdapat empat permohonan yang dibuat oleh semua pihak iaitu: (a) permohonan paintif untuk penghakiman terus menurut A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KM') dan A 27 k 3 KM berdasarkan afidavit-afidavit yang difailkan oleh defendan dalam guaman *Vitol* di mana defendan telah dikatakan mengakui keberhutangan mereka kepada plaintif kedua ('lampiran 26); (b) permohonan defendan untuk menggabungkan guaman ini dengan guaman *Vitol* ('lampiran 33'); (c) permohonan pencelah untuk mengemukakan semua pembelaan yang tersedia kepada defendan ('lampiran 28'); dan permohonan pencelah untuk menggantung tindakan ini ('lampiran 38'). Isu-isu untuk balasan adalah sama ada defendan telah membuat apa-apa pengakuan kepada tuntutan plaintif; sama ada plaintif kedua boleh memindahkan hakmilik dan milikan kepada defendan apabila hakmilik masih kekal dengan pencelah pada setiap masa matan; dan sama ada pencelah boleh mengemukakan apa-apa pembeaan atau adakah ia terbatas kepada pembelaan yang mana pembelaan itu boleh dikemukakan.

Diputuskan, membenarkan lampiran 26; menolak lampiran 28 sebahagiannya dengan kos; dan menolak kedua-dua lampiran 33 dan 38:

(1) Berdasarkan fakta yang dikemukakan oleh defendan dalam afidavit yang difailkan dalam guaman *Vitol*, tidak dipertikaikan bahawa plaintif kedua telah memasuki perjanjian bekalan bunker dengan defendan dan bunker tersebut telah digunakan oleh kapal defendan tetapi defendan tidak membuat bayaran untuk belian bunker tersebut. Oleh itu, terdapat merit dalam permohonan plaintif dalam lampiran 26 (lihat perenggan 28).

(2) Dalam afidavit-afidavit mereka, defendan-defendan mengambil kedudukan bahawa hakmilik dan milikan bunker tersebut adalah tidak relevan kepada tuntutan plaintif bagi harga belian bunker tersebut, oleh itu defendan telah diestopkan daripada berhujah bahawa terdapat isu yang perlu dibicarakan berhubung hakmilik kepada bunker tersebut. Selanjutnya, pindah hakmilik bukan hal perkara penting dalam kontrak antara plaintif kedua dan defendan, dan bahawa kegagalan untuk memindah hartanah dalam bunker tersebut, yang telahpun digunakan, tidak melepaskan obligasi defendan untuk membayar bagi belian bunker tersebut. Oleh itu, tiada isu yang boleh dibicarakan berhubung isu hakmilik bunker tersebut (lihat perenggan 34–35 & 44).]

Notes

For cases on admission as to amount claimed by plaintiff, see 2(5) Mallal's Digest (5th Ed, 2015) paras 9103–9105.

Cases referred to

PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another; 'Res Cogitans' [2015] EWHC 2022, CA (refd)

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453, CA (refd)

Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor [1985] CLJ Rep 639, HC (refd)

Ranhill Bersekutu Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd [2001] MLJU 3; [2001] 2 CLJ 380, HC (refd)

'The Soeraya Emas' Aseamlease Bhd v Owners of and other persons interested in the Ship or Vessel 'Soeraya Emas' [1992] 1 SLR 33, HC (refd)

United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657; [1999] 2 CLJ 151, FC (refd)

Vithal Kumar a/l Jayaraman v Azman bin Md Nor [2010] 2 MLJ 67, CA (refd)

Legislation referred to

Evidence Act 1950 s 18
Rules of Court 2012 O 14 r 1, O 27 r 3
Sale of Goods Act 1979

Sitpah Selvaratnam (Shim De Zhen with him) (Chua Assoc) for the plaintiff.
Mathew Kurien (Sativale Mathew Arun) for the defendant.
Jeremy Joseph (Joseph & Partners) for the intervener.

Azizah Nawawi J:

INTRODUCTION

[1] There are four applications before me:

(a) the plaintiffs' application for summary judgment pursuant to O 14 r 1 and/or O 27 r 3 of the Rules of Court 2012 ('the ROC 2012') in encl 26;

(b) the intervener's application for leave to enter a defence and/or plead and/or set up all defences available to the defendant in encl 28;

(c) the defendant's application to consolidate this case with admiralty in rem No 27NCC-37–06 of 2015 in encl 33; and

(d) the intervener's application to stay this action pending the final appeals on the English High Court decision in 'Res Cogitans' and the Singapore High Court decision in 'Precious Shipping' in encl 38.

[2] After hearing the parties, this court has allowed encl 26 and dismissed part of encl 28 and both encls 33 and 38.

THE SALIENT FACTS

[3] The facts, as pleaded in the plaintiffs' statement of claim disclosed that the first plaintiff, ING Bank NV ('ING') is a bank registered in Amsterdam, Netherlands.

[4] The second plaintiff, OW Bunker Middle East DMCC ('OWB'), is a registered body based in the United Arab Emirates ('UAE'). OWB was in the business of supply of marine fuel oil or bunkers to vessels calling at the ports in the UAE. OWB is currently in liquidation.

[5] On or about 19 December 2013, OWB entered into several facilities agreement with ING. In connection with the facilities agreement, ING and OWB entered into an English Omnibus Security Agreement on or about 19 December 2013 ('security agreement') whereby OWB assigned by way of security to ING all its rights, title and interest in respect of monies owing to or to be owed to it.

[6] The defendant, Malik Al Ashtar Ltd, is the registered and beneficial owners of the vessel 'Malik Al Ashtar' (IMO No 9525900) ('the defendant's vessel') of the port of Malta.

[7] United Arab Shipping Company ('UASC') is and was the registered ship manager of the defendant's vessel at all material times.

[8] On or about 9 October 2014, the defendant and/or UASC agreed to purchase 2,500 metric tonnes of bunker ('the subject bunker') from OWB at the agreed purchase price of USD531 per metric tonne ('the bunker supply agreement'). The subject bunker is to be delivered to the defendant's vessel, Malik Al Ashtar.

[9] Pursuant to the bunker supply agreement, on or about 15 October 2014 at about 0050 hours, the subject bunker was supplied to the defendant's vessel at Port of Khor Fakkan, UAE, through the bunker barge 'MT Nile'. The chief engineer of the defendant's vessel confirmed receipt of the bunkers on the vessel by endorsing a bunker delivery note receipt No 9157.

[10] An invoice No 129–19378 dated 15 October 2014 in the sum of USD1,310,774.03 ('the purchase price') was issued to the defendant/Charterer/UASC by OWB, for the subject bunker, requiring

payment within 30 days from the date of delivery, that is on/before 14 November 2014. A

[11] On 7 November 2014, before the expiry of the 30 days payment term, the defendant received a notice of lien over the subject bunker dated 7 November 2014 from the solicitors of the intervener, Vitol Asia Pte Ltd ('Vitol'). B

[12] Vitol is a company incorporated in Singapore and deals in the supply of bunker oils. C

[13] Vitol contends that OWB has purchased 2,468.501 metric tonnes of bunkers from Vitol vide a purchase order dated 9 October 2014. The bunkers were sold at USD528 per tonne for the total sum of USD1,303,368.53. Vitol further contends that the said bunkers were supplied to the defendant's vessel on 15 October 2014. Therefore, Vitol claim to be the true owners of the bunkers supplied to the defendant's vessel. D

[14] Meanwhile, on or about 10 December 2014, OWB entered into liquidation. Upon liquidation, and under the security agreement, OWB had assigned all its receivables, including the right to payment of the purchase price of the bunkers under the bunker supply agreement, with the defendant, to ING. E

[15] On or about 12 November 2014, OWB gave notice to the defendant and/or UASC informing them that OWB had assigned by way of security to ING all its rights in respect of the bunker supply agreement, and instructing payment of all amount payable under the bunker supply agreement to ING ('notice of assignment'). F G

[16] Further, a notice of enforcement dated 7 November 2014 and a notice of appointment of receiver and assignment dated 13 November 2014 were issued by ING to the defendant and/or UASC, demanding payment of all amounts owing by the defendant and/or UASC to ING under the bunker supply agreement. H

[17] The plaintiffs states that despite receipt of the subject bunker in accordance with the bunker supply agreement and various demands for payment of the purchase price that fell due for payment on 14 November 2014, in breach of the bunker supply agreement, the defendant has failed, refused and/or neglected to pay the purchase price of the subject bunker in the sum of USD1,310,774.03. I

[18] In February 2015, the defendant's vessel was arrested by the intervener, Vitol in Suit KLHC Admiralty Action in rem No 27NCC-3–02 of 2015 ('the *Vitol* suit'). In order to secure the release of the defendant's vessel, the defendant has made payment into court in the sum of RM6,492,126.70 (USD1,803,368.53).

[19] Whilst the *Vitol* suit is pending, on 21 June 2015, the plaintiffs have arrested the defendant's vessel in this action, as a security for the plaintiff's claim for the purchase price of the subject bunker supplied to the defendant's vessel. The defendant's vessel was released on 24 June 2015 upon the provision of fresh alternative security by the defendant for the plaintiff's claim in this action by way of payment into court the sum of RM7,331,481.80 (USD1,936,164.85).

[20] With regards to the *Vitol* suit, the defendant has taken out an application to strike out the said suit. The basis of the application is that the intervener Vitol has wrongly brought its claim in rem against the defendant when the defendant has no contractual nexus with the intervener over the supply of the subject bunker.

[21] The plaintiff filed this application for summary judgment based on the affidavits filed by the defendant in the *Vitol* suit where the plaintiffs claimed that the defendant has admitted their indebtedness to OWB for the purchase of the subject bunker under the bunker supply agreement, and that OWB is the proper contracting party entitled to receive payment of the purchase price under the bunker supply agreement.

THE FINDINGS OF THE COURT

Enclosure 26 — the plaintiffs' application for summary judgment

[22] Enclosure 26 is the plaintiff's application for summary judgment against the defendant, premised on admission of facts by the defendant in affidavits filed in the *Vitol* suit, Admiralty in Rem No 27NCC-3–02 of 2015. This application is made pursuant to O 14 r 1 and/or O 27 r 3 of the ROC 2012. Order 27 r 3 of the ROC 2012 reads as follows:

> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may give such judgment or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

[23] The above provision was considered by the Court of Appeal in *Vithal*

Kumar a/l Jayaraman v Azman bin Md Nor [2010] 2 MLJ 67, where the court held:

> The object of the above rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim ...
>
> *The rule relates to admission of fact, whether in the pleading or otherwise. The admission must be clear admission, and not simple evidence of some facts upon which the plaintiff would have to rely to establish his cause of action* ...
>
> The words '*or otherwise*' in the said rule are of general application and justify the making of an order or judgment *where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admissions contained in the pleadings alone*.

[24] It is also common ground that the court will not allow an application premised on O 27 r 3 of the ROC 2012 unless there is an unequivocal admission of facts. In *Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor* [1985] CLJ Rep 639, the High Court held that:

> In the instant case, 'I will pay' does not necessarily imply as 'I am legally obliged to do'.
>
> The question is whether what is stated is an admission of fact and if so whether that admission entitles the applying party to a judgment or order. *The admission may be implied from all circumstances but the Court must be satisfied that it amounts to an unequivocal admission for it to pronounce judgment by summary provided by* O 27 r 3. (Emphasis added.)

[25] It is the plaintiffs submission that the plaintiffs' claim against the defendant is a plain contractual claim for the payment of the purchase price for the bunker supplied and consumed by the defendant under the bunker supply agreement.

[26] Under the bunker supply agreement, the defendant has contracted with OWB to buy bunkers worth USD1,310,774.03 on/or about 9 October 2014 to be delivered to its vessel, 'Malik Al Ashtar'. The bunker was delivered and accepted onto the vessel on 15 October 2014. It would seem that the bunker supplied have been consumed by the defendant's vessel. The purchase price for the bunker was due to be paid within 30 days from the delivery of the bunker, on/before 14 November 2014 pursuant to the invoice issued by OWB to the defendant. Subsequently, the purchase price was duly assigned by OWB to ING and the defendant received notice for payment from ING Bank.

[27] Bearing in mind that this application is premised on admission of facts made by the defendant in the affidavits filed in the *Vitol* suit, the issue here is whether the defendant has made any admission to the plaintiffs' claim as

A contended by the plaintiff. Having perused the affidavits filed by the defendant in the *Vitol* suit, I am of the considered opinion that the defendant has admitted to the following facts:

(a) that the defendant has entered into the bunker supply agreement with OWB on or about 9 October 2014 for the delivery of about 2,500 metric tons of bunker at USD531 per metric tonne from the OWB. This can be seen from para 15 of the affidavit of Jorn Hinge affirmed on 15 March 2015 which reads:

> 15. As part of the marine fuel oil purchase transactions, on or about 9/10/2014, the Defendant/UASC placed on order (Defendant/UASC's purchase order) with OWB for purchase and delivery of about 2500 metric tones of marine fuel oil to be delivered to the Defendant's vessel 'Malik Al Ashtar' on 14/10/2014 at the port of Khor Fakkan, UAE. The agreed price for the bunkers was USD531.00 per metric ton ...

(b) that the defendant has admitted that the said bunker has been delivered to its vessel, 'Malik Al Ashtar' as can be seen from para 16 of the affidavit of Jorn Hinge affirmed on 15 March 2015 which reads:

> 16. *On or about 15/10/2014 at about 0050 hours, 'MT Nile', a bunker barge arranged by OWB delivered a quantity of about 2,468.501 metric tones of bunkers to the Defendant's vessel. The Chief Engineer of the vessel confirmed receipt of the bunkers on the vessels by endorsing a Bunker Delivery Note Receipt No: 9157 (BDN) issued by VVTI.* A copy of the said BDN is produced at page 19 of Exhibit 'D-1'.

(c) that the defendant has admitted to receiving the invoice from OWB for the sum of USD1,310,774.03 with interest at 3%. This can be seen from para 17 of the affidavit of Jorn Hinge affirmed on 15 March 2015 which reads:

> 17. OWB then issued an invoice No: 129–19378 dated 15/10/2014 in the amount of USD1,310,774.03 addressed to the Defendant/Charterers/UASC. *As in the previous transactions, OWB agreed with the Defendant/UASC for a 30 days payment term for its invoice No: 129 – 19378 with a due date on 14/11/2014, in default a 3% monthly interest* on the outstanding sum will accrue in accordance with its General Terms and Conditions of sale. A copy of the said OWB's Invoice No: 129–19378 is produced at page 20 of Exhibit 'D-8'.

(d) that the defendant was making arrangement to make payment for the purchase of the bunkers. This fact was admitted in para 19 of the affidavit of Jorn Hinge affirmed on 15 March 2015 which states:

> 19. *Sometimes in early November 2014, whilst the Defendant's ship managers UASC was arranging payment towards OWB above mentioned invoice*, it received separate letters from OWB Group's charge bank ING Bank N. V. Netherlands ('ING Bank') dated 7/11/2014, 12/11/2014 and 13/11/2014

giving notice to the Defendant/UASC that all of OWB's right in respect of supply contract and any payment due under the said OWB's Invoice No: 129–19378 dated 15/10/2014 in the amount of USD1,310,774.03 was duly assigned by way of security to ING Bank.

(e) that the defendant did not dispute the assignment of the purchase price of USD1,310,774.03 by OWB to ING. This is reflected in para 17 of the affidavit affirmed by Jorn Hinge on 5 May 2015, which reads:

> 17. The Plaintiff is aware that by virtue of the Security Agreement, all of OWB's right in respect of the bunkers supply contract to the Defendant's vessel and any payment due under the OWB's Invoice No: 129-19378 dated 15/10/2014 in the amount of USD1,310,774.03 was wholly assigned by way of security to ING Bank. *I am advised that this only fortifies that OWB's bunkers supply contract to the Defendant's vessel and any payment due there from to OWB under the OWB's Invoice No: 129-19378 dated 15/10/2014 is only payable to OWB and no other*. The Plaintiff has never challenged ING Bank's right relating to the assignment of OWB's rights under the Security Agreement. *It is therefore important to note that the right to the bunkers (if any) and payment remained with ING Bank/or OWB liquidators and not the Plaintiff before the commencement of this action* ...

(f) that the subject bunker has been consumed by the defendant's vessel. This is reflected in para 32 of the affidavit affirmed by Jorn Hinge on 15 March 2015, which reads:

> 32. Further and/or in the alternative, even if the Plaintiff's alleged General Terms and Conditions are applicable (of which the Defendant categorically denies), I am advised and verily believe as follows:
>
> (g) ...
>
> (h) ...
>
> (i) the Plaintiff's feeble attempts now to claim that the Defendant had deprived the Plaintiff from the use and possession of the bunkers is misconceived and unsustainable. For the reasons given above, *it is impractical for the Plaintiff to claim that it has continuing right to use and possess the bunkers after they were supplied to the Defendant's vessel had commingled and consumed prior to the Plaintiff's solicitor's (Reed Smith's) alleged notice of lien on 7/11/2014, produced at pages 29 to 30 of Exhibit 'D-2'*;
>
> (j) in relation to the Plaintiff's solicitor's (Reed Smith's) notice of lien dated 7/11/2014, it is clear that this notice was sent about three weeks after the bunkers had been supplied and *by which time they have been commingled and/or consumed by the Defendant's vessel*. It is apparent from the said notice of 7/11/2014 that it was a notice of the Plaintiff's exercise of lien over the bunkers. However, I verily believe that Clause 11.2 in the alleged Plaintiff's General Terms and Conditions, the right of lien purported to be a notice of lien over the vessel. In any event, I am

A advised and verily believe that it is nonsensical that the seller can have a lien over the Defendant's vessel as opposed to the bunkers which have been supplied, particularly in the circumstances of the case where the Defendant has no contract or any agreement with the Plaintiff for supply of the bunkers. In the premises, I a further advised and verily
B believe *that the lien notice was ineffective and as it was given too late and should have been given either immediately when the bunkers were supplied or beforehand so that the Defendant was given an opportunity not to consume or commingle the bunkers.* This was not done by the Plaintiff.

C **[28]** Premised on the above admitted facts by the defendant, I agree with the plaintiff that there is no dispute that the plaintiff and the defendant has entered into the bunker supply agreement, where the plaintiff had supplied the bunkers worth USD1,310,774.03 to the defendant's vessel. The said bunkers have been consumed by the defendant's vessel, and what remains now is the payment for
D the bunkers duly supplied and consumed. In the premise, I am of the considered opinion that there is merit in the plaintiff's application in encl 26.

[29] However, in para 38 of the written submission, the defendant takes this
E position:

> 38. The Defendant denies liability to both the Plaintiff and the Intervener.
>
> Their position is that they *do not object to paying for the bunkers*, but cannot be obliged to *pay both the Plaintiffs and the Interveners for the same subject bunkers*. This would be illogical.
>
> F As *there exists a dispute between the Intervener and the Plaintiffs as who is eventually entitled for the price*, this has to be determined by this Honourable Court based on the respective parties' arguments on the facts of the case, evidence and the applicable law.

G **[30]** The defendant therefore submits that in view of the competing claims on the purchase price of bunkers, by the plaintiff as the contractual supplier and by Vitol as the physical supplier, then premised on the case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151 (FC), there clearly 'arises circumstances of which ought to be
H investigated' and that in this case, there is 'some other reason for a trial' to warrant a trial of this case.

[31] However, I agree with the plaintiff that based on the admissions by the defendant in the paragraphs above, this is a plain case for summary judgment.
I Added to that, in the *Vitol* suit, the defendant takes the position that it is the plaintiffs, the contractual supplier of the bunkers and not the physical supplier Vitol, who is the proper party to demand payment from the defendant. This can be seen from the various extracts of the defendant's affidavits filed in court to strike out the *Vitol* suit, which are as follows:

(a) that the defendant's admission at para 22 of the affidavit affirmed by Jorn Hinge on 15 March 2015 that OWB is the proper contracting party and is the proper party with the right to demand payment for the supply of the subject bunker against the defendant:

> 22. Further, I wish to highlight that the Defendant/UASC has no knowledge or notice of the alleged Purchase Order or Sales Confirmation Note or the Plaintiff's General Terms and Conditions of sale before this dispute has arisen. The Defendant/UASC only dealt with OWB for the bunker supply and OWB's General terms and Conditions of Sale indicated that *OWB as a seller and proper contracting party for the supply of the bunker to the Defendant's vessel had the right to demand payment for the supply of the bunkers against the Defendant/UASC as buyers.*

(b) that the defendant's admission at para 34 of the affidavit affirmed by Jorn Hinge on 15 March 2015 that OWB is the party having the right of an action in rem in respect of the subject bunker:

> 34. ... In this connection, I am further advised and verily believe that the *rightful party having a right of action in rem for the bunkers delivered on 15/10/2014 is OWB and not the Plaintiff* ...

(c) that the defendant's admission at para 31 of the affidavit affirmed by Jorn Hinge on 15 March 2015 that the intervener's (Vitol) allegation that it retains title to the subject bunker is misconceived, and that Vitol does not retain ownership in the subject bunker:

> 31. Accordingly, I am advised and verily believe it to be true that the *Plaintiff's allegation of application of retention of title clause to the bunkers or lien on the Defendant's vessel for the cost of the bunkers against the Defendant in the amount of USD1,303,368,53 is wholly misconceived in law and in facts*.

[32] It is also the submission of the defendant that there is a triable issue with regards to the title to the subject bunker. The defendant submits that that pursuant to cl 11.2 of Vitol General Terms and Conditions, title in the bunkers only passes upon payment of the purchase price. Clause 11.2 reads as follows:

> Title to the Marine Fuels shall pass to the Buyer upon payment of the value of the Marine Fuels delivered ... Until full payment is made, the Seller shall have a lien over the Vessel for the value of the Marine Fuels delivered ...

[33] Therefore, since the plaintiffs have not paid Vitol the purchase price of the bunkers, then title and ownership of the subject bunker remained with Vitol at all material time. This, according to the defendant, amount to a triable issue which should defeat the plaintiffs' application.

[34] However, on this issue, I agree with the plaintiff that the defendant has taken a position contrary to what they have stated in their affidavits. In their

affidavits, the defendants took the position that title and ownership of the subject bunker is not relevant to the plaintiff's claim for the purchase price of the subject bunker. In para 9 of Jorn Hinge's affidavit affirmed on 12 August 2015, he states this:

> 9(b) I am advised by the Defendant's Solicitors and *verily believe that any issue as to the title and ownership of the bunkers supplied to the Defendant's vessel on credit terms is not relevant to this action as there was no express prohibition by the Intervener or OWB as to the immediate use or consumption of the bunkers by the Defendant's vessel*.

[35] Therefore, in view of the position taken by the defendant in their affidavit affirmed by Jorn Hinge's on 12 August 2015, the defendant is now estopped from submitting that there is a triable issue with regards to the title to the subject bunker. In any event, the issue of title is not relevant to the contractual relationship between OWB and the defendant as can be seen from the next issue below.

[36] The next issue raised by both the defendant and the intervener Vitol is that because title and ownership of the subject bunker remained with Vitol at all material time, then OWB cannot pass the title to the defendant. Therefore, since OWB was under an obligation to pass title to the defendant but failed to do so, then the plaintiffs are not entitled to the price of the subject bunkers. This is based on the United Kingdom Sale of Goods Act 1979 ('the SOGA 1979'). I take note that under the OWB Group Terms and Conditions, it stipulates that the sale of the subject bunkers is governed by English law, that is SOGA 1979.

[37] The very same issue, that is, the interpretation of a contract for the sale of bunkers between the contractual supplier and the owner of the vessel, and the application SOGA 1979, was decided by the English Court of Appeal in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another; 'Res Cogitans'* [2015] EWHC 2022 where the court held that transfer of title is not an essential subject matter of the contract of similar nature and that failure to transfer property in the bunkers, which has been consumed, did not relieve the defendant's obligation to pay for the purchase of the bunkers. In fact, Vitol in encl 38 has applied to stay this case pending the decision in *PST Energy 7* case.

[38] The factual matrix in *PST Energy* is similar to our case. On 4 November 2014, the first respondent, OW Bunker Malta Ltd ('OWBM') supplied bunkers to the vessel, Res Cognitans, which is owned by the appellants. OWBM obtained the supplies from its parent company, OW Bunkers & Trading A/S ('OWBAS'), which in turn obtained them from Rosneft Marine (UK) Ltd ('RMUK'), the physical supplier. OWBAS went into receivership and the second respondent, ING Bank asserted its rights to recover payment

from the appellant. On 17 November 2014, RMUK asserted that it remained the owner of the bunkers and seek payments from the owners. The owners have not paid either OWBM or RMUK for the bunkers which have been consumed within the 60 days period of credit allowed by OWBM's contract.

[39] In early December 2014, the owners initiated arbitration proceedings, seeking the following prayers:

(a) a declaration that they (the owners) are not bound to pay either OWBM or RMUK for the bunkers supplied to their vessel, *Res Cognitans*; alternatively

(b) damages for breach of contract on the grounds that OWBM had been unable to pass title in the bunkers to them.

[40] The interim award can be seen from para 6 of the case, which reads:

> 6. By an interim award published on 16th April 2015 the arbitrator determined all but one of the preliminary issues. They held that the *effects of OWBM's terms*, in particular the combination of the retention of title clause and the clause giving the owners the right to use the bunkers for the propulsion of the vessel in advance of payment, was that it did not undertake to transfer the property in the bunkers to them, and that therefore *the contract was not one for the sale of goods within the meaning of the Sale of Goods Act. As a result, OWBM could not recover the price of the goods undersection 49 of the Act, but was entitled to recover the price of the sum due as a simple debt.*

[41] On appeal, the High Court judge, Males J affirmed the arbitrators' decision. In para 9 of the judgment, the findings of Males J is stated as follows:

> 9. ... *He rejected the owners' argument that the contract was one for the sale of goods*, holding that it was not necessary to look behind the language of the contract to ascertain exactly what the parties have undertaken to do. *He held that OWBM had not undertaken to transfer property in the bunkers delivered to the vessel because both parties has specifically envisaged that some, if not all of them, were likely to have been consumed in the vessel's engine before the time for payment had come. When that happens they ceased to exist and it becomes impossible to transfer the property in them.*

[42] Before the Court of Appeal, the issue is '*whether OWBM was bound to transfer title in the contract goods...*', (see para 12). On the interpretation of the contract, Lord Justice Moore-Bick held in para 33–34:

> 33. On this point *I agree with the Judge ... It is a contract under which goods are to be delivered to the owners as bailees with a licence to consume them for the propulsion of the vessel, coupled with an agreement to sell any quantity remaining at the date of payment, in return for a money consideration which in commercial terms can be described as the price ...*
>
> *The commercial background and the terms of the contract make it clear that what the*

A *owners contracted for was not the transfer of the property in the whole of the bunkers, but the delivery of a quantity of bunkers which they had an immediate right to use but for which they would not have to pay until the period of credit expired* ...

34. For these reasons, *I agree with the judge that the transfer of the property in the bunkers from OWBM to the owners was not the essential subject matter of the contract and that a failure to transfer property in the bunkers, all of which had been consumed when the period of credit expired, did not relieve the owners of the obligation to pay for them*. (Emphasis added.)

C **[43]** In his concurring judgment, Lord Justice Longmore held as follows:

44. ... *once the bunkers were delivered, the owners incurred an obligation to pay* and were not released from that obligation by the fact that OWBM were unable to (and did not) transfer title before they were consumed. (Emphasis added.)

D **[44]** Therefore, premised on the decision above, the transfer of title is not an essential subject matter of the contract between OWB and the defendant, and that failure to transfer property in the bunkers, which has been consumed, did not relieve the defendant's obligation to pay for the purchase of the bunkers. As such, there is no triable issue with regards to the issue of title to the bunkers.

E **[45]** Premised on the reasons enumerated above, I am of the considered opinion that the plaintiff's application premised on O 27 r 3 of the ROC 2012 should be allowed as there is a clear admission by the defendant to the sum due and owing from the sale of the subject bunkers. To this, I wish to refer to the

F case of *Ranhill Bersekutu Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd* [2001] MLJU 3; [2001] 2 CLJ 380, where the court said at p 384:

These admissions by the defendants and having been made in the collateral proceedings filed in court, are admissions made in the face of the court records and are well within the ambit of s 18 of the Evidence Act 1950*; as clear and unambiguous statements made by*

G *the party in proceedings and as such are conclusive evidence, admissible to negate the element of dispute, or as otherwise as provided for under O 27(3) of the Rules of the High Court 1980; and the defendants are now accordingly estopped from pleading or alleging that there is a dispute between the parties*, and/or warranting a reference to the arbitrator or mediator; and or in the stay of proceedings. (Emphasis added.)

H *Enclosure 28 — the intervener's (Vitol) application for leave to enter a defence and/or plead and/or set up all defences available to the defendant*

I **[46]** Paragraph 1(b) of encl 28 is for leave to allow the intervener, Vitol to enter a defence and/or plead and/or set up all defences available to the defendant. Paragraph 1(b) of encl (28) reads:

In the event that the Defendant fails, refuses or neglects to set up the defence, inter alia, of title to sue, the Intervener be granted leave to enter a defence and/or plead and/or set up any and all defences available to the Defendant, inter alia, that the

Plaintiffs do not own the subject-matter of the bunkers and have no title to sue for costs of the bunkers (and any other defences) within fourteen (14) days from the date of appearance is entered (or within such other period the Court may direct.

[47] Parties are on common ground that an intervener in rem proceeding can protect its interest in the property by defending the action. In *'The Soeraya Emas' Aseamlease Bhd v Owners of and other persons interested in the Ship or Vessel 'Soeraya Emas'* [1992] 1 SLR 33, the High Court of Singapore held at p 491:

> 36. A person who has been given leave to intervene in an admiralty action in rem does not prosecute his claim in that action. He protects his interest in the property by defending the action in rem. In doing so he will be permitted to set up such defences which the owners of the ship could have set up had they defended the action. See *The Byzantion* (1922) 16 Asp MLC 19; 127 LT 756.

[48] The next issue is whether the intervener can set up any defence it wishes or is the intervener limited to set up such defences which the owner of the ship could have set up.

[49] Vitol submits that premised on the case *The 'Soeraya Emas'*, an intervener would be entitled to raise such defences not raised by the defendant who has entered appearance in the in rem proceedings. Therefore, the fact that the defendant here has entered appearance and appears to be defending the plaintiffs' claims is not relevant and does not preclude Vitol from setting up such defences to protect its interest.

[50] However, I agree with the plaintiff that the intervener's rights to protect its interest in this proceeding is limited only to the defences that can be raised by the defendant.

[51] This is based on the case of *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453, where the Court of Appeal held at pp 483–484:

> In the report of the *The Byzantion* (1922) 12 Ll L Rep 9, the first two paras read as follows:
>
> > The admiralty court has jurisdiction under s 3 of the Admiralty Court Act 1840 to take cognizance of mortgage claims relating to a ship if the ship or proceeds are instituted, notwithstanding that the mortgage is not a legal mortgage. *A party who intervenes in, and defends an action in rem cannon set up defence which the owners of the ship could not have set up had they appeared and defended.*

[52] At p 759, the court added:

> The result is that, whatever the Greek law, and whether the mortgagees have in fact a mortgage upon a ship or not, they, by agreement, are to have the same rights as

A against Mr Mango as if they had a registered mortgage on an English ship. Mr Mango, by contract, agrees to submit to the jurisdiction in rem or in personam given to the court by s 11 of the Act 1861 as if the ship and mortgage were registered in England. The effect is two fold: (1) as to jurisdiction, there is jurisdiction, there is jurisdiction by contract; (2) as to rights, as between the Graham Company and
B Mr Mango, the Graham Company are to be treated as if they were registered mortgagees of a British ship, and as if entitled to sue in rem. *The interveners contend that they cannot be prejudiced by this agreement between the mortgagees and mortgagor, and that as against them, the agreement must be disregarded. In my view, this contention confuses the rights of the intervener.* Intervention may be or either or both of two
C purposes: (1) to defend the action either as to liability or as to quantum or both, and (2) to establish a prior claim to the res without defending the action. *But where the intervener defends, he defends an action not against himself but against the res and, as there can be no liability of the res unless there is a personal liability of the owner, he defends an action against the owner*. The questions on such a defence are: *Is the owner liable to the plaintiff, and has the plaintiff a right in rem against the ship? It follows that*
D *the intervener cannot set up defence unless they are defences which the owner could set up*. If the suit is one which the plaintiff could, if the owner appeared, maintain in rem against the ship, because the owner was liable in a suit in rem, the plaintiff can maintain it in rem against the intervener. *The position of the intervener is, qua defence, and same as that of an owner who appears under protest, and the issue to be tried is the*
E *same as on a petition in protest*. If by agreement, the Graham Company have a good cause of action in rem and, if by the agreement the court is given jurisdiction as between the Graham Company and Mr Mango, the interveners in defending the action cannot stand in any better position than Mr Mango ... (Emphasis added.)

F **[53]** Therefore, Vitol stands in the same position as the owner, and it follows that Vitol cannot set up defence unless they are defences which the owner could set up himself.

[54] In the present case, Vitol is seeking to set up the defence, inter alia, that
G since the 'Plaintiffs do not own the subject matter of the bunkers, they have no title to sue for costs of the bunkers'. However, in the affidavits, the defendant owner takes the position that title is not relevant in this action, and has affirmed that 'any issue as to the title and ownership of the bunkers supplied to the defendant's vessel on credit terms is not relevant to this action'. As such, I am of
H the considered opinion and I agree with the plaintiff that Vitol cannot resile from the position taken by the defendant in this case.

[55] In any event, even if we are to accept the defendant's submission on the issue of title, the same has been decided by the English Court of Appeal in the
I *PST Energy 7* case. So, if the defendant's case on title falls, it goes without saying that Vitol proposed defence on title is a non-starter.

[56] Added to that para 1(b) of encl 28 correctly seeks to defend only in circumstances of a default of plea by the defendant. Since the defendant has

entered appearance, and is actively defending the plaintiffs' claim, I agree with the plaintiffs that prayer 1(b) is no longer applicable.

[57] As such, all the other prayers of encl 28 are dismissed with costs.

Enclosures 33 and 38

[58] In view of my decision above, the application to consolidate this case with the *Vitol* Suit is no longer relevant. Further, I am also of the considered opinion that the Vitol's application to stay this action pending the final appeals on the English High Court decision in '*Res Cogitans*' and the Singapore High Court decision in '*Precious Shipping*' is not relevant.

Enclosure 26 allowed; encl 28 dismissed in part; and both encls 33 and 38 dismissed.

Reported by Dzulqarnain Ab Fatar